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No. 02-

IN THE

Supreme Court of the United States

ADVANTA CORP. AND
ADVANTA MORTGAGE CORPORATION, U.S.A.,
Petitioners,

v.

MILTON RISEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal appellate court violates a defendant's Seventh Amendment right to a jury trial when it seeks to remedy a jury's demonstrable error in assessing a civil damage award by reducing the award on the basis of judicial speculation as to the jury's underlying findings.

STATEMENT PURSUANT TO RULE 29.6

Advanta Corporation is the corporate parent of Advanta Mortgage Corporation, U.S.A. No publicly held company owns 10% or more of Advanta Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Advanta Corp. and Advanta Mortgage Corporation, U.S.A. (collectively, "Advanta") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-12a) is not reported. The opinion and order of the district court (App. 13a-46a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 2002. A petition for rehearing was denied on August 8, 2002. App. 51a-52a. On October 23, 2002, Justice Souter extended the time for filing a petition for a writ of certiorari

to and including December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

In this case, which involves a terminated employee's claim to certain bonuses, the court of appeals correctly determined that the jury's damage award exceeded the maximum amount to which the employee could ever have been legally entitled. The verdict form makes it impossible to ascertain the exact nature of the jury's error. The court of appeals nonetheless reviewed the record, drew its own conclusions concerning which bases of liability the jury intended to find, and calculated a new damage award based on that conjecture. The court refused the defendant's request for a new trial. Because the court of appeals' order rests on judicial speculation concerning the bases for the jury's original award, it impermissibly invades the province of the jury, in violation of the Seventh Amendment. The court's approach conflicts with that of this Court and other courts of appeals, reflects a more general confusion in the circuits concerning the proper use of appellate remittitur, and warrants intervention by this Court.

1. Respondent Riseman began working for Advanta in 1992. App. 13a. In 1994 he became President and Chief Executive Officer of Advanta Mortgage Corporation, U.S.A. *Id.* In April 1997, Advanta offered Riseman a bonus, equal to 200% of his base salary, in the event of a "change of control affecting [his] group" (the "1997 bonus"). App. 14a. In May 1998, Advanta offered Riseman another conditional bonus (the "1998 conditional bonus"), based on various factors.

App. 15a. In 1998 Riseman was also eligible for a bonus under the Advanta Management Incentive Program ("AMIP"), an annual performance bonus program designed to reward key executives based on individual performance and the performance of relevant business units. *Id.*

In August 1998, various disputes arose, and Riseman's employment thereafter ended. App. 15a-16a. Advanta determined that Riseman was not entitled to receive the 1997 bonus, the 1998 conditional bonus, or the 1998 AMIP bonus. *Id.*

2. Riseman sued Advanta in the United States District Court for the Eastern District of Pennsylvania. App. 16a. He alleged, among other things, age discrimination and retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and violations of the Pennsylvania Wage Payment and Collection Law, 43 Pa. Cons. Stat. § 260.1 *et seq.* ("WPCL"). App. 2a-3a. The WPCL entitles employees to receive wages and benefits earned as of the date of their termination. Riseman claimed that Advanta's refusal to pay him the 1997, 1998 conditional, and 1998 AMIP bonuses violated both the ADEA and his contract rights, enforceable under the WPCL. Advanta denied any age discrimination, and contested Riseman's contractual claims to the different bonuses on various grounds.

The 1997 and 1998 conditional bonuses sought by Riseman were for specific amounts—$650,000 and $400,000, respectively. App. 2a, n.1. The 1998 AMIP bonus was variable. App. 15a. In his closing argument at trial, Riseman's attorney argued to the jury that if Advanta had not fired Riseman's in violation of the ADEA, Riseman would have received a 1998 AMIP bonus of several million dollars. That argument contradicted the trial evidence, including testimony from Riseman himself and his expert, that the 1998 AMIP bonus could not have exceeded Riseman's annual base salary of $385,000. App. 8a-9a.

The jury rejected Riseman's claim of age discrimination, but found in his favor on other claims, including retaliation under the ADEA and liability under the WPCL. App. 17a, 47a-48a (verdict form). As to damages, the verdict form specified the total amount awarded ($3,939,126); the amount awarded for "back pay" under the ADEA ($1,377,125); and the amount awarded under the WPCL ($2,562,001). App. 48a-49a.[1] The verdict form does not indicate the specific grounds on which the jury found liability or awarded damages under the WPCL—that is, for which of the three potential bonuses it found Advanta liable, or what amount it attributed to any particular bonus. *Id.* Likewise, the verdict form does not specify how much of the ADEA award reflected bonuses. *Id.*

Advanta objected to the jury's damage award before the jury was discharged. The trial judge overruled the objection, and later denied Advanta's motion for a new trial based on the damage award, in each case on the ground that the high WPCL award could have represented Riseman's performance bonus. *See* App. 27a-29a (post-trial order).

3. The court of appeals reversed in part. App. 1a-12a. As relevant here, the court agreed with Advanta that the trial record conclusively established that Riseman's potential 1998 AMIP bonus could not have exceeded 100% of his base salary, or $385,000. App. 8a-9a. Because the only three items of damage sought by Riseman on his WPCL claim were the 1997 bonus of $650,000, the 1998 conditional bonus of $400,000, and the 1998 AMIP bonus, the maximum total damages under the WPCL amounted to $1,435,000—$1,127,001 less than the jury had awarded. App. 9a.

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[1] Although the verdict form contemplated that the damages to which Riseman was entitled under the WPCL might also have been included in another portion of the award, review of the verdict form reveals that the amounts the jury allocated to ADEA "back pay" and to the WPCL claims together equal the amount of the overall award. App. 49a.

The court nonetheless refused Advanta's request that it remand the case for a new trial. *Id.* Instead, the court declared itself "persuaded by the record that the jury verdict included all three bonuses in awarding the original $2.562 million WPCL award." *Id.* On the basis of that "persua[sion]," the court reduced the WPCL award to $1,435,000, and remanded the case only for recomputation of liquidated damages (which depend on the amount of the underlying award) and entry of judgment on the revised award. App. 9a-10a, 12a.[2]

REASONS FOR GRANTING THE PETITION

This case presents a well-defined and important question under the Seventh Amendment. That question is framed by two circumstances that are clear from the opinion below. First, the jury's damage award with respect to Riseman's contract claims was demonstrably erroneous, because it exceeded the maximum total amount he could have received if he had been awarded each of the three bonuses he claimed. Second, because it is not possible to tell from the verdict form what bonuses the jury found Riseman should have received, or how much of the damage award it attributed to each bonus, the court of appeals' decision to reduce the damage award to the maximum possible amount necessarily rested on a determination *by the court* of what the jury meant to find, or should have found, as to liability and damages with respect to each of the three bonuses. Under these circumstance, the court's order directing the entry of a reduced judgment and denying the defendant's request for a new trial invades the province of the jury and violates the Seventh Amendment.[3]

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[2] The court did not disturb the ADEA award, based in part on hypothetical computations that assume the jury understood and adhered to the same limitation on annual AMIP bonuses that the court concluded the jury disregarded in making its WPCL award. *See* App. 5a.

[3] The constitutional right to a jury trial attaches to any claim that is legal in nature and is tried in federal court, even if the claim arises under

1. Where the effect of an error on liability or damage determinations is clearly ascertainable, an appellate court may properly permit the entry of judgment in a corrected amount, at least with the consent of the aggrieved party. *See, e.g.*, *Hansen* v. *Boyd*, 161 U.S. 397 (1896) (court could "clearly distinguish and separate" erroneous portion of damage award because it was "clearly ascertainable from the evidence contained in the record"); *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642 (1886) (award could be reduced without need for speculation regarding jury's liability findings). Over a century ago, however, this Court made clear that there must be a new trial—or at least the option of a new trial—where it is impossible to determine how some error infected a jury's verdict. In *Maryland* v. *Baldwin*, 112 U.S. 490 (1884), an heir alleged that the administrators of an estate had not properly discharged their duties. The defendants filed several pleas in response. The jury rendered a general verdict for the defense. This Court held that testimony material to the first defense plea was improperly admitted; but given the general verdict, the Court could not "perceiv[e] upon which plea [the jury] found." *Id.* at 493. Rather than speculating regarding the jury's findings, the court held that "the case must, for this error, go back for a new trial." *Id.* at 494.

The Court addressed similar issues again in *Dimick* v. *Scheidt*, 293 U.S. 474, 486 (1935), which rejected the use of "additur" (as opposed to "remittitur") in the federal courts. A court may not properly enter judgment, the Court emphasized, when doing so would assume a "matter of fact which no jury has ever passed upon either explicitly or by implication." *Id.* at 486-87. While a court should not permit a verdict to stand if it is "palpably and grossly inadequate or excessive," judicial reduction of the award is permissible only on the theory "that what remains is included in the verdict along with the unlawful excess—in the sense that *it has been*

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state law. *See, e.g.*, *Simler* v. *Conner*, 372 U.S. 221, 222-23 (1963) (per curiam).

found by the jury—and that the remittitur has the effect of merely lopping off an excrescence." *Id.* at 486 (emphasis added). In other circumstances—such as with "additur"—the court would be effectively "compel[ling] the plaintiff [or the defendant] to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'" *Id.* at 486-87. In any event, where the original award cannot stand, "both parties remain entitled, as they were entitled in the first instance, to have a *jury* properly determine the question of liability and the extent of the injury by an assessment of damages." *Id.* at 486 (emphasis added); *see also Hetzel* v. *Prince William County*, 523 U.S. 208, 211 (1998) (per curiam) (citing *Dimick* for this proposition).

In *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), the Court held that a new trial was required where the jury was instructed to consider an impermissible element of damages, and the effect of the error on the final award could not be ascertained from the general verdict form. In *Stachura*, the district court instructed the jury to consider compensatory damages for violations of constitutional rights. This Court found, however, that the damages "based on the abstract 'value' or 'importance' of constitutional rights [were] not a permissible element of compensatory damages." *Id.* at 310. Because the general verdict did not specify the grounds on which the jury based its award, and "the effect of the erroneous instruction [was] therefore unknowable, although probably significant," the Court held that a new trial was required. *Id.* at 312-13.

The common premise of these decisions is that a court may not enter judgment on a civil damages verdict, without the parties' consent, if doing so requires speculation about what findings the jury made, or would have made in the absence of some later-recognized error. It does not matter that the same verdict might be supported on some alternative basis. It is the jury, not the court (and certainly not a court of appeals), to which the Constitution commits determinations

of fact, including the assessment of damages within proper legal limits. The Court has repeatedly reaffirmed these principles. *See, e.g., Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (rejecting one of several theories of liability and expressly reaffirming *Baldwin* rule requiring retrial where court is unable to determine theory of liability underlying general verdict); *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959) (new trial required where "there [was] no way to know that the invalid claim . . . was not the sole basis for the verdict").

The court of appeals' decision in this case cannot be squared with this Court's precedents. As set out above, Riseman asserted three bases for liability under the WPCL: the 1997 bonus, the 1998 conditional bonus, and the 1998 AMIP bonus. The evidence showed that even if the jury found Riseman entitled to the maximum possible amount for each bonus, the total award could not have been more than $1.435 million. Accordingly, the court properly held that the jury's $2.562 million award under the WPCL could not stand. Having reached that conclusion, however, the court simply could not know from anything in the record exactly how the jury erred, or what effect its error or errors had on the computation of its undifferentiated award. Nothing in the verdict form (or elsewhere) indicates whether the jury found liability as to each bonus, or what part of its excessive award was based on any particular bonus.

The jury might, for example, have found Advanta liable under the WPCL only for the 1998 AMIP bonus—on which, as noted above, Riseman's counsel focused in closing, arguing (incorrectly) that that bonus alone was worth several million dollars. In that event, "correcting" the jury's verdict to conform to its actual findings on liability would have resulted in a *maximum* award of $385,000, rather than $1.435 million. Or the jury might have found Advanta liable for the 1998 conditional bonus and the 1998 AMIP bonus, but not the 1997 bonus (which was conditioned on a change of control in

Riseman's business unit). In that event, conforming the verdict to the liability findings would have resulted in a maximum award of $785,000—although only on the assumption, which would also have been improper, that all of the excess in the jury's award was attributable to the AMIP bonus. Or perhaps the jury found Advanta liable for all three bonuses, but included the amounts assessed for the 1998 conditional bonus and the 1997 bonus in the award of backpay under the ADEA, while assessing $2.562 million in liability solely on the 1998 AMIP bonus under the WPCL count. Correcting that error would again have led to a reformed WPCL verdict of no more than $385,000.

The examples are easily multiplied, and the point is simple: Although the court of appeals in this case could be certain that the jury erred in awarding damages under the WCPL, it had no way of fashioning a remedy for that error that would *necessarily* be consistent with the jury's actual findings, either as to liability or as to particular elements of damages. Without ordering a new trial, it could do no more than what it did—review the record itself, and make its own determination of what the jury had in mind. *See* App. 9a ("[W]e are persuaded by the record that the jury verdict included all three bonuses in awarding the $2.562 million WPCL award."). But that is not a determination that the Constitution allows a reviewing Court to make. However well- or ill-founded the court's speculation, it invaded the province of the jury, and deprived Advanta of its right to have a jury make findings, within proper legal bounds, as to both liability and damages.

The court of appeals' error is both straightforward and quite clear. In a case a few years ago involving a similar Seventh Amendment issue, the Fourth Circuit directed the reduction of what it considered an excessive verdict for the plaintiff; and then, in an unpublished order, granted the defendant's petition for a writ of mandamus when the district court proposed to allow the plaintiff to retry the case. *See Hetzel*, 523 U.S. at 208-10. This Court summarily reversed.

Id. at 208, 212. The Court's opinion simply noted that, under longstanding precedent, "a court has no authority, upon a motion for new trial, 'according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.'" *Id.* at 211 (quoting *Kennon* v. *Gilmer*, 131 U.S. 22, 29 (1889)); *see also id.* (citing *Dimick* for its conclusion that where a damages verdict is set aside, "both parties remain entitled to have a jury determine the issues of liability and the extent of injury").[4] The same principle dictates the proper outcome of this case. Accordingly, this Court may again wish to consider summary disposition.

2. Alternatively, the Court should grant plenary review in this case to address issues of appellate remittitur that have generated increasing conflict and confusion in the lower courts.

The court of appeals' decision in this case cannot be reconciled with the decision of the Fifth Circuit in *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir.), *reh'g denied*, 530 F.2d 34 (5th Cir. 1976).[5] In *Jamison*, a contract case, the jury returned a $607,000 verdict against the defendant. On appeal, the Fifth Circuit concluded that no "set of calculations with a rational basis in the evidence [could] justify the jury's $607,000 award." 526 F.2d at 932. Although it acknowledged the practice of ordering remittitur when confronted with an excessive award, the court held that the circumstances of the case before it, in which the plaintiff had asserted different claims but the jury had returned only a general verdict, left it "no alternative" but to order a new

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[4] *Cf. Donovan* v. *Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam) (summarily affirming court of appeals' refusal to entertain appeal from plaintiff who had accepted remitted award "under protest," in order to clarify rule in light of other circuit decisions "depart[ing] from [this Court's] unbroken precedents" dating back to *Kennon* v. *Gilmer*).

[5] The decision below is also inconsistent with older authority from the Third Circuit itself. *See Jayne* v. *Loder*, 149 F. 21 (3d Cir. 1906).

trial. *See id.* at 934-35 ("[W]ithout knowing whether the jury found for the plaintiff on the 'termination without cause' or on the settlement count, an answer obscured by the general verdict, we cannot calculate the maximum recovery on which to base the remittitur.") (footnote omitted); *see also id.* at 935 n.27 ("[T]he general verdict foreclose[d] ascertainment of the liability basis of the jury's award.").

As the Fifth Circuit reiterated in denying a petition for rehearing, *Jamison* holds that when a jury verdict is excessive, but it is impossible "to determine the theory of liability on which the jury premised its overly generous verdict," an appellate court must order a new trial. 530 F.2d at 34. That holding succinctly describes the circumstances of this case. Yet, rather than conceding its inability to "ascertain[] the liability basis of the jury's award," 526 F.2d at 935 n.27, and granting Advanta's request for a new trial, the Third Circuit in this case examined the record and "persuaded" itself of what the jury intended to include in its verdict. App. 9a. This case would have been decided differently in the Fifth Circuit.

More generally, in *Lin* v. *McDonnell Douglas Corp.*, 742 F.2d 45 (1984), the Second Circuit explained that the courts have come to use remittitur in at two basic situations: "(1) where the court can identify an error that caused the jury to include in the verdict a quantifiable amount that should be stricken, and (2) more generally, where the award is 'intrinsically excessive' in the sense of being greater than the amount a reasonable jury could have awarded, although the surplus cannot be ascribed to a particular, quantifiable error." *Id.* at 49 (citations omitted). In the second type of case, the court observed, "courts have developed conflicting rules about how to compute" the amount of the award that should be remitted, with some reducing the award to the maximum a reasonable jury could have awarded, some to what they think a reasonable jury would have awarded, and some to the minimum result a reasonable jury could have reached. *Id.* at 49-50. The court did not pursue that issue, because it determined

that in the case before it—in which the plaintiff had accepted a remitted award, but the defendant had appealed and sought a new trial—the errors at trial had "infected the jury's entire consideration of plaintiff's pecuniary loss." *Id.* at 50. Relying on *Dimick* and other cases, the court reasoned that where the nature of the errors did not allow the court to "start[] with the jury's verdict and cut[] it down" to a more reasonable amount, but instead effectively required the court to "calculate the damages from zero and build up," judicial adjustment of the award was impermissible because it would "disregard[] the jury's verdict entirely and deprive[] the defendants of their right to trial by jury." *Id.*

That reasoning is inconsistent with the court of appeals' decision in this case. The court below purported to do nothing more than reduce an excessive verdict. But although this case involved jury error in assessing quantifiable contract damages, rather than "intrinsically excessive" tort-type damages, the court had no way to ascertain from the record the information necessary to identify any "quantifiable amount that should be stricken" from the award in order to conform it both to the law and to the jury's actual findings. *See id.* at 49. Unlike in a case involving an "intrinsically excessive" verdict, the court of appeals in this case was forced to speculate about what grounds of liability the jury must have embraced, and how much it must have intended to award on each such ground. The court's judgment thus amounted, in effect, to "calculat[ing] the damages from zero and build[ing] up"—thus "disregard[ing] the jury's [actual] verdict entirely and depriv[ing] the defendants of their right to trial by jury." *Id.* at 50.[6]

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[6] *See also Westbrook* v. *General Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985) (remittitur inappropriate where closing argument's improper appeal to excessive damages prejudices jury's entire damages consideration). As noted above, in this case Riseman's counsel argued in closing that the jury should award him millions of dollars solely on the basis of the 1998 AMIP bonus.

Over time, other courts of appeals have proven quite aggressive in their approach to remittitur—although in most instances such decisions, unlike the Third Circuit's, afford at least one party the option of demanding a new trial, rather than accepting the remitted award.[7] In *Kropp* v. *Ziebarth*, 601 F.2d 1348, 1354-55 (1979), for example, the Eighth Circuit concluded that some of the damages evidence "was highly excessive and [might] well have confused the jury," and that the nature of the verdict made it impossible to determine the effect of the identified errors. In light of "the case's complexity, the already large record and the length of time that has transpired since the events in question," however, the court nonetheless directed the district court to propose a remittitur based on the appellate court's own "estimate" of the effect of the errors—conditioned on acceptance by one party, but not the other. *Id.* at 1355. Similarly, in *Deakle* v. *John E. Graham & Sons*, 756 F.2d 821, 827-34 (11th Cir. 1985), the Eleventh Circuit agreed with the defendant that the jury's award of $400,000 for future wages was excessive, and lamented both the state of the record and that "[a]ll too often appellate courts are saddled with the task of correcting mistakes in damage awards caused by inattentive litigants at trial." *Id.* at 834. But rather than remand the case for retrial of the damages question to the jury on proper evidence and instructions, the appellate court itself conducted a complete re-examination of the trial evidence, filled in evidentiary gaps, and computed a formula to be applied in determining a remitted verdict—conditioned on acceptance by the plaintiff, but not by the defendant. *See id.* at 827-34, 834.

These are just a few example of cases in which courts of appeals have embraced judicial recalculation of damages,

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[7] Giving a plaintiff the option to accept a reduced award does not, of course, cure any violation of the *defendant's* independent constitutional right to have a jury determine both liability and damages. *See Dimick*, 293 U.S. at 486 ("*both* parties remain entitled . . . to have a jury properly determine the question of liability and the extent of the injury").

based on re-examination of the evidence from the remote appellate perspective. These cases often inappropriately hold or assume—as the court of appeals in effect did in this case—that the court should "independently determine the *maximum possible award* that is reasonably supported by the evidence in the record." *Id.* at 827 (emphasis added); *see* App. 9a.[8] Moreover, they ignore the fact that under the Seventh Amendment and *Dimick*, the defendant has the same right as the plaintiff to have the jury, not a reviewing court, decide disputed factual issues.

These issues concerning the appropriate or inappropriate use of remittitur by the courts of appeals are intrinsically important, because of the challenge they pose to the Seventh Amendment rights of parties—and particularly defendants—in federal courts. They are also of increasing practical importance, as appellate remittitur becomes more and more common. *See generally* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237; Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives*, 38 Case Western L. Rev. 157 (1987). Often, moreover, as in the present case, appellate courts couch their adjustments to jury verdicts in conclusory terms that may discourage further review. *Cf.* Sann, *supra*, 38 Case Western L. Rev. at 197 & n.164. This case presents an appropriate vehicle for this Court to offer a much-needed reaffirmation of

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[8] *See also, e.g.*, *Skalka* v. *Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 424-27 (6th Cir. 1999) (directing district court to calculate remittitur reflecting court of appeals' assessment of where jury might have erred in assessing and allocating damages in ADEA/contract case); *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d 1148, 1159-63 (10th Cir. 1985) (directing district court to enter remittitur order based on court of appeals' assessment of maximum award sustainable under evidence concerning fraud and lost profits); *Kolb* v. *Goldring, Inc.*, 694 F.2d 869 (1st Cir. 1982) (directing new trial unless plaintiff agrees to accept reduced award based on court's recalculation of ADEA damages to determine "upper limit of a justifiable sum").

the central Seventh Amendment principle that a federal court may not simply adjust a jury's award of damages. That principle applies with particular force in a case such as this one. The jury's verdict is demonstrably erroneous; and the effect of those errors cannot be precisely determined and corrected in any way that ensures that every aspect of the final judgment, as to liability and as to damages, rests firmly on findings actually made by the jury itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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